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In the Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM J. CLINTON,
PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

JAMES T. GOLDSMITH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

In the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Tit. V, § 563(a)(1)(A) and (b)(1), 110 Stat. 325, Congress authorized the President to drop from the rolls of the armed forces, and thereby terminate military status and pay for, any commissioned officer who has been sentenced to confinement for more than six months by court-martial, after the officer's conviction has become final and the officer has served in confinement for a period of six months. 10 U.S.C. 1161(b)(2), 1167 (Supp. II 1996). The questions presented are:

1. Whether the Court of Appeals for the Armed Forces has jurisdiction under the All Writs Act, 28 U.S.C. 1651(a), to bar the President from exercising his authority to drop a commissioned officer from the rolls under 10 U.S.C. 1161(b)(2) and 1167 (Supp. II 1996).

2. Whether the President's exercise of authority under 10 U.S.C. 1161(b)(2) and 1167 (Supp. II 1996) in this case would violate the Double Jeopardy Clause of the Fifth Amendment or the *Ex Post Facto* Clause, U.S. Const. Article I, Section 9, Clause 3.

PARTIES TO THE PROCEEDING

Petitioners are William J. Clinton, President of the United States; William S. Cohen, Secretary of Defense; F. Whitten Peters, Acting Secretary of the Air Force; Lieutenant General David W. McIlvoy, Vice Commander, HQ Air Education and Training Command, Randolph Air Force Base, Texas. Petitioners were named as respondents/appellees in the court of appeals. All petitioners appear in their official capacities only. The claims against the following individuals were dismissed by the court of appeals as moot: Robert M. Walker, Acting Secretary of the Army; Colonel Marvin Nickels, Commandant, U.S. Disciplinary Barracks, Fort Leavenworth, Kansas; and Colonel Gatrell, Commander, Munson Army Hospital, Fort Leavenworth, Kansas.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 48 M.J. 84. The order of the Air Force Court of Criminal Appeals (Pet. App. 22a-24a) is unreported. A prior opinion of the Air Force Court of Criminal Appeals affirming respondent's court-martial conviction (Pet. App. 30a-38a) is also unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on April 29, 1998. On July 21, 1998, Chief Justice Rehnquist extended the time within which to file a petition for a writ of

certiorari to and including August 27, 1998. The petition was filed August 26, 1998. The jurisdiction of this Court rests on 28 U.S.C. 1259(3).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are reproduced at App., *infra*, 1a-8a.

STATEMENT

Following trial by a general court-martial, respondent was convicted of willfully disobeying a "safe sex" order from a superior officer, assault with means likely to produce death or grievous bodily harm, and assault consummated by a battery, in violation of Articles 90 and 128 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 890, 928. He was sentenced to six years' confinement and forfeiture of $2500 pay per month for 72 months. The Air Force Court of Criminal Appeals affirmed the conviction, and respondent sought no further review of that decision. The Air Force then initiated action to drop respondent from the rolls of the Air Force because of his court-martial conviction and sentence. On respondent's application, the Court of Appeals for the Armed Forces issued an extraordinary writ under the All Writs Act, 28 U.S.C. 1651(a), barring the President and military officials from dropping respondent from the rolls of the Air Force.

A. The Statutory Background

1. The President, as Commander in Chief of the armed forces, commissions all officers of the military. U.S. Const. Art. II, § 3. Since 1870, the President also has had the authority to drop from the rolls of the Army any officer who has been absent from duty for three months without leave. Act of July 15, 1870, ch. 294, § 17, 16 Stat. 319. In 1911, Congress extended the President's authority to drop from the Army's rolls officers who have been absent in confinement in a prison or penitentiary after final conviction by a civilian court. Act of Jan. 19, 1911, ch. 22, 36 Stat. 894; see also Act of Apr. 2, 1918, ch. 39, 40 Stat. 501 (authorizing President to drop from the rolls of the Navy and Marine Corps officers who have been absent from duty without leave for three months or more or found guilty by civilian authorities of any offense); Act of May 5, 1950, ch. 169, § 10, 64 Stat. 146 (authorizing President to drop from the rolls "of any armed force" officers who have been absent without authority for at least three months or finally sentenced to confinement in a Federal or State penitentiary or correctional institution).

On February 10, 1996, as part of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Tit. V, § 563(a)(1)(A) and (b)(1), 110 Stat. 325, codified at 10 U.S.C. 1161(b)(2) and 1167 (Supp. II 1996), Congress expanded the President's authority to drop officers from the rolls. Section 1161(b)(2) authorizes the President to "drop from the rolls of any armed force any commissioned officer * * * who may be separated under section 1167 of this title by reason of a sentence to confinement adjudged by a court martial." 10 U.S.C. 1161(b)(2) (Supp. II 1996). Section 1167 in turn provides that "a member sentenced by a court-martial to a period of confinement for more than six months may be separated from the member's armed force at any time after the sentence to confinement has become final * * * and the member has served in confinement for a period of six months." 10 U.S.C. 1167 (Supp. II 1996).

2. A military officer also may be involuntarily separated under a variety of other circumstances and pro-

ceedings. For instance, the President may order the dismissal of an officer "in time of war." 10 U.S.C. 1161(a)(3). An officer also may be administratively separated because of the officer's "substandard performance," "misconduct" or "moral or professional dereliction" or because the officer's "retention is not clearly consistent with the interests of national security." 10 U.S.C. 1181(a) and (b); see also 10 U.S.C. 1182-1186 (setting forth procedures for separation and rights of review before boards of inquiry and boards of review). An officer's separation under Section 1181 is characterized by the particular armed force as Honorable, General (Under Honorable Conditions), or Under Other Than Honorable Conditions. See DoD Instruction 1332.40, Encl. 7 (Sept. 16, 1997); Air Force Instruction 36-3206, §§ 2.1, 3.1 (Oct. 14, 1994).

Similarly, enlisted servicemembers may be administratively discharged "as prescribed by the Secretary concerned." 10 U.S.C. 1169. Pursuant to Section 1169, the Secretary of Defense has promulgated regulations that set forth the "policies, standards, and procedures governing the administrative separation of enlisted members." 32 C.F.R. 41.1; see also Air Force Instruction 36-3208 (Oct. 14, 1994). Under those regulations, enlisted servicemembers may be separated for, among other things, "[c]ommission of a serious military or civilian offense" in certain circumstances or when the member requests administrative separation "in lieu of trial by court-martial." 32 C.F.R. Pt. 41, App. A, pt. 1, K.1.a(3) and L.[1]

[1] As is the case with the separation of officers under Section 1181, an enlisted member's discharge under Section 1169 may result in a characterization of service as Honorable, General (Under Honorable Conditions), or Under Other Than Honorable Conditions. 32 C.F.R. Pt. 41, App. A, pt. 1; Air Force Instruction 36-3208, §§ 1.16.1, 1.18 (Oct. 14, 1994).

An officer or enlisted member may challenge an administrative separation from the military. Each armed force has a Board for Correction of Military Records that may review a member's "discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial)" or "correct any military record * * * when * * * necessary to correct an error or remove an injustice." 10 U.S.C. 1552(a)(1), 1553(a). Such Boards may award back pay, 10 U.S.C. 1552(c), and, "subject to review by the Secretary concerned, change a discharge or dismissal," 10 U.S.C. 1553(b). "Board decisions are subject to judicial review [by federal courts] and can be set aside if they are arbitrary, capricious, or not based on substantial evidence." *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983).

3. Officers and enlisted members may also be separated from the military as part of a criminal sentence imposed by court-martial under the UCMJ, 10 U.S.C. 801 *et seq.* Under the President's authority to prescribe the maximum "punishment which a court-martial may direct for an offense," 10 U.S.C. 856, the President has prescribed "three types of punitive separation" that may be adjudged by a court-martial: a "dismissal" of a commissioned officer who is convicted of any offense by a general court-martial; a "dishonorable discharge" of an enlisted member who is convicted of certain offenses by general court-martial; and a "bad conduct discharge" of an enlisted member who is convicted of certain offenses by general or special court-martial. Rules for Courts-Martial (R.C.M.) 1003(b)(9)(A)-(C). "A court-

martial may not adjudge an administrative separation from the service." *Id.* at 1003(b)(9).

A court-martial sentence that includes a punitive dismissal or discharge is subject to review as of right by a military department's Court of Criminal Appeals. 10 U.S.C. 866(b)(1). That appellate decision is subject to discretionary review by the Court of Appeals for the Armed Forces (CAAF). 10 U.S.C. 867(a). Congress established the CAAF pursuant to its power to govern and regulate the armed forces under Article I, Section 8, Clause 14, of the Constitution. 10 U.S.C. 941. The CAAF has power to act "only with respect to matters of law" and "only with respect to the findings and sentence as approved by the [court-martial's] convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." 10 U.S.C. 867(c); see generally *Weiss* v. *United States*, 510 U.S. 163, 167 (1994); *Parisi* v. *Davidson*, 405 U.S. 34, 41 n.7 (1972).

B. The Current Controversy

1. Respondent is a commissioned officer in the United States Air Force serving in the rank of Major. After he was diagnosed as HIV-positive, his superior commissioned officer ordered him to inform sexual partners of his HIV status and to employ methods, including condoms, to prevent the transfer of bodily fluids during sexual relations. Pet. App. 31a. Respondent nevertheless had unprotected vaginal intercourse with a fellow officer and a civilian without informing them that he was HIV-positive. Respondent was thereafter tried by general court-martial on two specifications of willfully disobeying a "safe sex" order from a superior officer, two specifications of assault with a means likely to produce death or grievous bodily harm,

and one specification of assault on a superior commissioned officer, in violation of 10 U.S.C. 890 and 928. Respondent was convicted as charged, except that he was acquitted of assault on a superior officer and instead convicted of the lesser-included offense of assault consummated by battery. On March 4, 1994, respondent was sentenced to six years' confinement and forfeiture of $2500 pay per month for 72 months. On November 20, 1995, the Air Force Court of Criminal Appeals affirmed the conviction. Respondent did not seek further review of that decision in the United States Court of Appeals for the Armed Forces under 10 U.S.C. 867(b), and his conviction therefore became final. 10 U.S.C. 871(c)(1)(A); see also R.C.M. 1209(a). Respondent was incarcerated at the United States Disciplinary Barracks at Fort Leavenworth, Kansas. Pet. App. 2a.

2. On or before December 18, 1996, the Air Force notified respondent that it had initiated action under Section 1161(b)(2) to drop him from the rolls of the Air Force on the basis of his final court-martial conviction and confinement. Pet. App. 25a-29a. On December 20, 1996, while serving in confinement, respondent petitioned the Air Force Court of Criminal Appeals for extraordinary relief under the All Writs Act, 28 U.S.C. 1651(a), alleging that his receipt of HIV medication had been interrupted. On January 9, 1997, the Air Force Court of Criminal Appeals denied the petition for lack of jurisdiction. Pet. App. 22a-24a.

On January 23, 1997, respondent filed a combined Petition for Extraordinary Relief and Writ Appeal in the United States Court of Appeals for the Armed Forces, reiterating his claims with regard to his medication, and arguing for the first time that the Air Force's action to drop respondent from its rolls violated

the Double Jeopardy and *Ex Post Facto* Clauses. Respondent argued that because his court-martial conviction triggered the Air Force's action to drop him from the rolls, Sections 1161(b)(2) and 1167, which were enacted after his conviction, imposed an *ex post facto* punishment. He similarly contended that the provisions violated the Double Jeopardy Clause because they authorized the infliction of successive punishment based on the same conduct underlying his conviction. Pet. App. 13a; Resp. C.A. Br. A1-6 to A1-9.

3. On August 25, 1997, the court of appeals issued an order staying any proceeding to drop respondent from the rolls. Pet. App. 20a-21a. In October 1997, respondent's sentence expired and he returned to duty status. In April 1998, the court of appeals denied respondent's writ-appeal petition respecting his medical treatment claim as moot but, by a three-to-two vote, granted his petition for extraordinary relief barring the President and military officials from taking action to drop respondent from the rolls. Pet. App. 1a-19a.[2]

The court of appeals rejected the Air Force's contention that the court lacked jurisdiction under All Writs Act to entertain respondent's requests for extraordinary relief. The Air Force had argued that the challenged matters constitute "administrative actions which are separate and apart from the processing of any matter against [respondent] under the Uniform Code of Military Justice." Gov't C.A. Br. 9. The court

[2] After the court of appeals stayed the Air Force's action to drop respondent from the rolls, but before the court of appeals issued its decision, the Air Force instituted an administrative separation proceeding against respondent under Section 1181 and Air Force Instruction 36-3206 and 36-3207. The Air Force has deferred that proceeding pending the resolution of this case.

of appeals, however, noted that its earlier decisions had rested on the premise that "Congress intended for the [court of appeals] to have broad responsibility with respect to administration of military justice." Pet. App. 5a. It therefore had found jurisdiction to review via the All Writs Act "a case that [the court] cannot possibly review directly." *Id.* at 5a-6a. In light of those decisions, the court concluded that it is thus "empowered by the All Writs Act to grant extraordinary relief in a case in which the court-martial rendered a sentence that constituted an adequate basis for direct review in this Court after review in the intermediate court." *Id.* at 6a.

The court then held that respondent at least initially was entitled to bring a writ-appeal petition raising his medical treatment claim, even though his "release from confinement has now mooted his claim." Pet. App. 8a. The court further found that respondent's failure to raise in the Court of Criminal Appeals his challenge to the Air Force's personnel action was not fatal to the court of appeal's jurisdiction. The court explained that, "consistent with the concept of 'pendent jurisdiction,'" respondent's "proper filing in this Court of a writ-appeal petition as to suspension of necessary medications allowed him to 'piggyback' thereon * * * the issue of lawfulness of dropping him from the rolls of the Air Force." *Id.* at 9a.

Turning to the merits of respondent's challenge to Sections 1161 and 1167, the court of appeals acknowledged that the President's statutory authority to drop an officer from the rolls is "not labeled 'punishment,'" but instead is part of Title 10 that concerns "[p]ersonnel" matters. Pet. App. 14a. Nevertheless, the court held that, "[a]lthough the issue is a close one, * * * in order fully to accomplish the purposes of the

Ex Post Facto and Double Jeopardy Clauses," the Air Force's action to drop respondent from the rolls based on a court-martial conviction should be treated as "punitive." *Ibid.* The court explained that Congress enacted Sections 1161 and 1167 as part of the same public law, Pub. L. No. 104-106, that added to the UCMJ Article 58b, 10 U.S.C. 858b (Supp. II 1996), a provision that mandates the forfeiture of military pay following a prescribed sentence imposed by court-martial. Pet. App. 14a. The court also observed that in *United States* v. *Gorski*, 47 M.J. 370 (C.A.A.F. 1997), it had held that Article 58b is a punitive sanction under the UCMJ that is subject to the *Ex Post Facto* Clause. Pet. App. 13a. The court further reasoned that an action to drop an officer from the rolls involves a "stigma very akin to that involved in 'punishment.'" *Id.* at 14a. The court of appeals therefore held that "under all the circumstances surrounding enactment of Pub. L. No. 104-106, the provision for 'dropping from the rolls' was 'punitive' for purposes of the Double Jeopardy Clause and, *a fortiori*, for purposes of the *Ex Post Facto* Clause." *Id.* at 15a n.10. In a footnote, the court stated that those same statutory "circumstances" also sufficed to distinguish *Hudson* v. *United States*, 118 S. Ct. 488 (1997), in which this Court had found that an occupational debarment sanction imposed on individuals administratively for their banking violations did not constitute "punishment" under the Double Jeopardy Clause. Pet. App. 14a-15a n.10.[3]

[3] Judges Cox and Sullivan filed separate concurrences. Pet. App. 15a-17a. Judge Cox wrote to respond to the dissent's criticism that the court lacked jurisdiction under the All Writs Act to review an "administrative action" to drop an officer from the rolls. Pet. App. 15a. In his view, the court's "jurisdiction extends only to the Constitutional *ex post facto* question." *Id.* at 16a. Judge Sullivan emphasized the court's "responsibility of protecting the rights of all servicemembers in court-martial matters," especially "when a 'second punishment,' directly tied to [a] court-martial, is imposed * * * by an *ex post facto* law." *Id.* at 17a.

Judge Gierke, joined by Judge Crawford, dissented. Pet. App. 17a-19a. They observed that "[d]ropping an officer from the rolls (DFR) traditionally has been treated as an administrative measure separate from the court-martial," and unlike the provision at issue in *United States* v. *Gorski*, *supra*, "[Section] 1167 is not part of the Uniform Code of Military Justice but, instead, is part of the United States Code pertaining to personnel matters." Pet. App. 17a-18a. In their view, dropping an officer from the rolls is purely an "administrative personnel decision, in the same category as a decision to not promote the officer, to reassign the officer, to revoke the officer's security clearance, or to administratively separate the officer for substandard performance." *Id.* at 19a. Thus, Judges Gierke and Crawford would have held that the court lacked jurisdiction to review the Air Force's action to drop respondent from the rolls. *Ibid.*

SUMMARY OF ARGUMENT

1. The court of appeals lacks jurisdiction under the All Writs Act, 28 U.S.C. 1651, to enjoin the President and military officials from instituting a personnel action to drop respondent from the rolls of the Air Force. The All Writs Act authorizes courts to issue writs "necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. 1651(a). The writ in this case furthers no such jurisdiction.

Congress has confined the jurisdiction of the Court of Appeals for the Armed Forces to the review of specified sentences imposed by court-martial. 10 U.S.C.

866(b), 867(a). The action to drop respondent from the rolls of the Air Force was not, and could not have been, a feature of a court-martial sentence. The Air Force instituted the personnel action against respondent under the administrative provisions of 10 U.S.C. 1161(b)(2) and 1167 after his court-martial sentence already had become final. Because an action to drop from the rolls is not within the court of appeals' existing or potential appellate jurisdiction, the court of appeals writ was not "in aid of" the court's jurisdiction under the All Writs Act.

The court of appeals' writ also was not "necessary or appropriate" within the meaning of the All Writs Act. Respondent could have brought his personnel challenge before the Air Force's Board for Correction of Military Records, and then sought judicial review of an adverse Board decision in a federal court. *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983). Because such means of review are available to respondent, the court of appeals erred in invoking the All Writs Act as an alternative avenue of relief.

The court of appeals' assertion of jurisdiction over respondent's personnel challenge also cannot be supported by the theory that this challenge was "pendent" to respondent's claim that he was denied medical treatment while in confinement. The court of appeals had no jurisdiction over respondent's medical treatment claim. In any event, respondent's medical treatment claim and his personnel claim are not sufficiently related such that the claims could be considered "pendent."

2. The court of appeals further erred in holding that the Air Force's personnel action triggers the application of the Double Jeopardy and *Ex Post Facto* Clauses. Those Clauses apply only to laws or proceedings that impose *criminal* punishment. Whether a particular

sanction is civil or criminal depends on legislative intent, unless "the clearest proof" establishes that "the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Hudson* v. *United States*, 118 S. Ct. 488, 493 (1997) (internal quotation marks, brackets, and citations omitted).

Congress intended an action to drop an officer from the rolls to be a *civil*, administrative proceeding. An action to drop from the rolls is not part of a criminal sentence imposed by a court-martial under the Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.* Rather, an action to drop from the rolls is an administrative personnel action by which the President may separate an officer who is no longer suitable for military service because he has been absent without leave or has been convicted of a crime.

There is no proof, let alone the clear proof needed, to overcome Congress's intention to create a civil sanction. An action to drop an officer from the rolls of the armed forces is not punitive either in its purpose or effect. It is a remedial measure designed to remove an officer who is no longer performing military service or whose continued service is inconsistent with the military's mission, standards of conduct, and good order and discipline. Those remedial purposes are especially apparent in light of the officer's status as a leader in the military chain of command.

The civil, remedial character of an action to drop from the rolls is not altered by the fact that the action is based on a court-martial conviction. Congress may impose a civil and criminal sanction for the same underlying conduct, *Hudson*, 118 S. Ct. at 496; *Helvering* v. *Mitchell*, 303 U.S. 391, 397-398 (1938), and a criminal conviction often results in adverse collateral employ-

ment consequences that do not constitute criminal punishment. Similarly, the loss of military privileges resulting from separation from the military is not a criminal punishment, because such a sanction "is characteristically free of the punitive criminal element." *Hudson*, 118 S. Ct. at 496 (quoting *Helvering* v. *Mitchell*, 303 U.S. at 399 & n.2).

ARGUMENT

I. THE COURT OF APPEALS FOR THE ARMED FORCES LACKED JURISDICTION UNDER THE ALL WRITS ACT TO BAR THE MILITARY FROM DROPPING RESPONDENT FROM THE ROLLS OF THE AIR FORCE

Respondent challenges the constitutionality of the Air Force's action to drop him from the rolls. The court of appeals, however, lacked jurisdiction under the All Writs Act, 28 U.S.C. 1651, to hear that challenge. Respondent's claim did not come within the court of appeals' limited jurisdiction to review court-martial convictions under 10 U.S.C. 867. The court of appeal's writ in this case was therefore not "necessary or appropriate in aid of [the court's] jurisdiction[ ]" (28 U.S.C. 1651(a)).

1. The Court of Appeals for the Armed Forces is an Article I court with limited jurisdiction. Its jurisdiction is restricted by statute to court-martial cases reviewed by a Court of Criminal Appeals involving specific types of sentences: a sentence of death; a sentence including dismissal of a commissioned officer; a sentence including the dishonorable or bad conduct discharge of an enlisted servicemember; or a sentence to confinement for one year or more. 10 U.S.C. 866(b), 867(a); *Weiss* v. *United States*, 510 U.S. 163, 168 (1994); *Parisi* v. *Davidson*, 405 U.S. 34, 41 n.7, 44 (1972). The Court of

Appeals for the Armed Forces thus "may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." 10 U.S.C. 867(c).

There is no dispute that the court of appeals lacked jurisdiction under 10 U.S.C. 867 to hear respondent's challenge to the Air Force's personnel action to drop him from the rolls, which the Air Force initiated almost one year after respondent's conviction became final. Pet. App. 25a-29a; see also 10 U.S.C. 1167 (Supp. II 1996) (authorizing separation only "after the sentence to confinement has become final under [the UCMJ]"). The court of appeal's jurisdiction under Section 867 is limited to court-martial cases on direct review, *Hendrix* v. *Warden*, 49 C.M.R. 146, 147 (C.M.A. 1974), and an administrative action to drop from the rolls is not part of a sentence adjudged by a court-martial. See R.C.M. 1003(b)(9) ("A court-martial may not adjudge an administrative separation from the service.").

Because the court of appeals has no source of jurisdiction directly to review an action to drop from the rolls, it has no jurisdiction over respondent's challenge pursuant to the All Writs Act, 28 U.S.C. 1651(a). The All Writs Act authorizes courts to issue writs "necessary or appropriate in aid of their respective jurisdictions." The quoted language means that courts may issue writs only in cases otherwise within their original or appellate jurisdiction; the Act does not expand the bases for jurisdiction. *Pennsylvania Bureau of Correction* v. *United States Marshals Serv.*, 474 U.S. 34, 41 (1985) (Act does not authorize review "where jurisdiction [does] not lie under an express statutory provision"); *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 603 (1966) (Act "extends to the potential jurisdiction of the

appellate court where an appeal is not then pending but may be later perfected"); *In re Massachusetts*, 197 U.S. 482, 488 (1905) (Court lacks jurisdiction to issue writs "in cases over which [it] possesses neither original nor appellate jurisdiction"); *McClung* v. *Silliman*, 19 U.S. (6 Wheat.) 598, 601 (1821) (the Act "vest[s] the power * * * in cases where the jurisdiction already exists"); see also 16 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3932, at 470 (2d ed. 1996) ("The All Writs Act * * * is not an independent grant of appellate jurisdiction."); 19 *Moore's Federal Practice* § 204.02[4] (3d ed. 1998) ("[t]he All Writs Act cannot enlarge a court's jurisdiction").[4]

[4] Before Congress authorized this Court in 1983 to review decisions of the Court of Appeals for the Armed Forces (formerly the Court of Military Appeals), see Military Justice Act of 1983, Pub. L. No. 98-209, § 10(a)(1), 97 Stat. 1405, this Court recognized "the power of the Court of Military Appeals to issue an emergency writ * * * in cases * * * which may ultimately be reviewed by that court." *Noyd* v. *Bond*, 395 U.S. 683, 695 n.7 (1969). The Court recognized, however, that "[a] different question would, of course, arise in a case which the Court of Military Appeals is not authorized to review under the governing statutes." *Ibid.* Similarly, in *Parisi* v. *Davidson*, 405 U.S. 34, 44 (1972), this Court explained that "the All Writs Act only empowers courts to 'issue all writs necessary or appropriate in aid of their respective jurisdictions . . .,' and the jurisdiction of the Court of Military Appeals is limited by the Uniform Code of Military Justice to considering appeals from court-martial convictions." The Court in *Parisi* therefore questioned whether the Court of Military Appeals could consider a servicemember's claim for discharge from the military as a conscientious objector, over which "[t]hat court has been given no 'jurisdiction.'" *Ibid.* The Court further observed that "[w]hether this conceptual difficulty might somehow be surmounted is a question for the Court of Military Appeals itself ultimately to decide." *Ibid.* Now that this Court has jurisdiction to review decisions of the court of appeals, the question is one for ultimate resolution in this Court.

Those decisions establish that the court of appeals may issue a writ under 28 U.S.C. 1651 only when the writ is issued "in aid of" a court's existing or potential appellate jurisdiction. No such pending or potential case on appeal existed in this case, apart from the application for the extraordinary writ itself, Accordingly, the writ in this case barring the President and military officials from dropping respondent from the rolls of the Air Force is not "in aid of" (28 U.S.C. 1651(a)) the court of appeals' limited jurisdiction to review court-martial convictions under 10 U.S.C. 867.

In asserting jurisdiction over respondent's challenge to the action to drop from the rolls, the court of appeals reasoned that, because the All Writs Act authorizes the court "to grant extraordinary relief in a case that it cannot possibly review directly," the Act must at least empower the court "to grant extraordinary relief in a case in which the court-martial rendered a sentence that constituted an adequate basis for direct review in this Court after review in the intermediate court." Pet. App. 6a. Respondent in turn argues (Br. in Opp. 3, 7) that the court of appeals has jurisdiction under the Act, because the action to drop him from the rolls exacted additional punishment that was not imposed by his adjudged court-martial sentence.

Both of those theories are flawed. They rest on the erroneous reasoning that, because the court of appeals could have reviewed respondent's court-martial sentence, it also could review, under the All Writs Act, a later personnel decision that never could have been part of the court-martial sentence. The All Writs Act does not, however, provide such a free-floating con-

tinuous source of jurisdiction. The Air Force's action to drop respondent from the rolls was not part of respondent's sentence imposed by court-martial under the Uniform Code of Military Justice, nor could have it been. Rather, it was initiated under Sections 1161(b)(2) and 1167 and was commenced only after respondent's conviction had become final. Moreover, respondent brought his petition against the President, the Secretary of Defense, and military officials who were not even parties to the court-martial. Resp. C.A. Br. 8 (seeking "a writ of mandamus or a writ of prohibition to preclude [the President, the Secretary of the Air Force and an Air Force Lieutenant General] from dropping [respondent] from the rolls of the Air Force or terminating his pay"). In those circumstances, the court of appeals' writ was not "in aid of," but reached well beyond, the court's limited jurisdiction under 10 U.S.C. 867.[5]

2. The court of appeals' assertion of jurisdiction in this case also is inconsistent with the requirement that a writ be "necessary or appropriate" (28 U.S.C. 1651(a)) in furtherance of a court's jurisdiction. "[T]he All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is con-

[5] Even apart from the lack of a statutory basis for the court of appeal's assertion of jurisdiction in this case, the court of appeals had no jurisdiction "to enjoin the President in the performance of his official duties." *Franklin* v. *Massachusetts*, 505 U.S. 788, 803 (1992) (quoting *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866)); see also *id.* at 827 (Scalia, J., concurring) (separation-of-powers principles bar "requests for declaratory or injunctive relief in official-capacity suits that challenge the President's performance of executive functions").

trolling." *Carlisle* v. *United States*, 517 U.S. 416, 429 (1996) (quoting *Pennsylvania Bureau of Correction*, 474 U.S. at 43); see also *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 27-28 (1943) ("[o]rdinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed"); 19 *Moore's Federal Practice*, *supra*, § 201.40 ("a writ may not be used * * * when another method of review will suffice").

Respondent sought extraordinary relief from the court of appeals to challenge an action to drop him from the Air Force's rolls. Congress, however, has assigned the responsibility for review of such claims, not to the military courts reviewing court-martial sentences under the Uniform Code of Military Justice, but to the Boards for Correction of Military Records, 10 U.S.C. 1552 and 1553, and the federal courts. See *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983). A Board may review a member's "discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial)" or "correct any military record * * * when * * * necessary to correct an error or remove an injustice." 10 U.S.C. 1552(a)(1), 1553(a). Thus, the Board may review any personnel action affecting a servicemember's military record, such as an administrative discharge, the characterization of such discharge, a disciplinary action, or a performance evaluation.

Servicemembers dissatisfied with a Board decision may obtain further review in the federal courts. *Chappell*, 462 U.S. at 303; see, *e.g.*, *Doe* v. *United States*, 132 F.3d 1430, 1433 (Fed. Cir. 1997) (suit under Tucker Act, 28 U.S.C. 1491, for reinstatement, back pay, and correction of military records following officer's administrative discharge based on sexual molestation of daughter); *Thomas* v. *Cheney*, 925 F.2d 1407, 1411 (Fed. Cir.)

(challenge to action to drop from the rolls under Little Tucker Act, 28 U.S.C. 1346(a)(2)), cert. denied, 502 U.S. 826 (1991); *Roelofs* v. *Secretary of the Air Force*, 628 F.2d 594, 596 (D.C. Cir. 1980) (federal district court suit raising due process challenge to administrative discharge based on conviction of civilian offense).[6] Because respondent had an adequate means to challenge an administrative separation based on his prior court-martial conviction, the court of appeals' extraordinary writ was neither "necessary [n]or appropriate" (28 U.S.C. 1651(a)).[7]

3. Respondent also mistakenly relies (Br. in Opp. 4-7) on previous decisions of the court of appeals that invoked the All Writs Act "to achieve the ends of justice by overseeing the administration of justice in the United States Armed Forces." *Id.* at 5. The court of

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[6] In 1996, Congress directed the Secretary of Defense to establish an advisory committee to make recommendations and findings on the question whether Congress should vest a single court with jurisdiction to review administrative military personnel actions. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Tit. V, § 551, 110 Stat. 318. On January 13, 1997, the Secretary forwarded to Congress the *Report of the Committee on Judicial Review of Administrative Military Personnel Actions of the Department of Defense*, which proposed a bill directing personnel actions primarily to the Boards for Correction of Military Records with centralized review in the Federal Circuit. Under the proposed legislation, administrative exhaustion is required if any aspect of the servicemember's claim is amenable to Board review. Congress has not acted on the proposal.

[7] Moreover, Congress has directed that the court of appeals "shall take action only with respect to matters of law." 10 U.S.C. 867(c). Because the court of appeals lacks fact-finding power, it is particularly inappropriate for the court of appeals to assert original jurisdiction over administrative personnel actions that often will entail the resolution of factual disputes.

appeals' assertion of "broad responsibility with respect to administration of military justice," Pet. App. 5a, cannot confer jurisdiction where none exists. The court of appeals is an Article I court with strictly circumscribed jurisdiction. It has not been empowered to provide broad oversight of all issues arguably related to military justice.[8]

Contrary to respondent's assertion (Br. in Opp. 5), this Court in *United States* v. *Augenblick*, 393 U.S. 348 (1969), did not "endorse[]" *United States* v. *Bevilacqua*, 39 C.M.R. 10 (C.M.A. 1968). In *Bevilacqua*, the Court of Military Appeals considered a challenge to a court-martial conviction that was not subject to appellate review under 10 U.S.C. 867 on the theory that the court of appeals could "accord relief to an accused who has palpably been denied constitutional rights in any court-martial." *Id.* at 11-12. In *Augenblick*, the Court reserved the question whether the Court of Claims could collaterally review a court-martial conviction and held that the Court of Claims erred in its ruling on the merits. 393 U.S. at 351-352. The Court also observed that the Court of Military Appeals "apparently" could

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[8] Respondent similarly argues that history of 10 U.S.C. 867 confirms that Congress established the court of appeals to play a "key role * * * in enhancing the fairness of military justice." Br. in Opp. 6; see also *id.* at 7, 15. Congress, however, has always confined the court of appeals' jurisdiction to the review of specified sentences imposed by court-martial. Act of May 5, 1950, Ch. 169, Arts. 66-67, 64 Stat. 128-130 (establishing Court of Military Appeals to review cases in which a court-martial sentence affects a general or flag officer or extends to death, dismissal of an officer, cadet or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more); see also H.R. Rep. No. 491, 81st Cong., 1st Sess. 7, 32 (1949); S. Rep. No. 486, 81st Cong., 1st Sess. 3, 28-29 (1949).

have reviewed the defendant's challenge to his conviction under *Bevilacqua*. *Id.* at 350. The Court did not, however, indicate its approval of *Bevilacqua*, which, in any event, did not even mention the All Writs Act and was not at that time subject to this Court's review. See note 4, *supra*.

4. The court of appeals' jurisdictional holding cannot be justified on the theory that respondent's personnel claim is "pendent" to his now-moot claim that he received improper medical treatment while in confinement. Pet. App. 9a. Although a court does not lose pendent jurisdiction simply because the claim within the court's original jurisdiction becomes moot after the filing of a complaint, *Rosado* v. *Wyman*, 397 U.S. 397, 402-405 (1970), none of the requirements for pendent jurisdiction is met in this case.

As an initial matter, the court of appeals lacked power under the All Writs Act to review respondent's medical treatment claim, because that claim was not within the court's existing or potential appellate jurisdiction. Respondent's conviction was already final when he filed his petition for extraordinary relief in the court of appeals under 10 U.S.C. 871(c)(1). Moreover, because the court of appeals may act only with respect to "the findings and sentence as approved by the convening authority" (10 U.S.C. 867(c)), the court of appeals' "jurisdiction does not extend to the review of medical determinations made by officials at the United States Disciplinary Barracks." Pet. App. 23a-24a (opinion of Air Force Court of Criminal Appeals); see also note 7, *supra*.

Moreover, respondent's challenge to the constitutionality of a personnel action to drop from the rolls under 10 U.S.C. 1161(b) and 1167 (Supp. II 1996) may not be reviewed by the CAAF on a theory of pendent

appellate jurisdiction. It is doubtful that the CAAF, whose jurisdiction Congress specifically limited to the review of court-martial sentences reviewed by the Court of Criminal Appeals (10 U.S.C. 867(a)), and nothing else, has authority to assert pendent appellate jurisdiction over other types of claims. Cf. *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 50-51 (1995) (reserving the question whether "court of appeals, with jurisdiction over one ruling, [may] review, conjunctively, related rulings that are not themselves independently appealable"). Even assuming that the CAAF has such power, respondent's personnel challenge is not an appellate matter, since it was not raised in the Court of Criminal Appeals, Pet. App. 9a, and is not sufficiently related to his claim that he was denied proper medical treatment while in confinement such that the claims could be considered pendent. See *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966) (the "claims must derive from a common nucleus of operative fact," and are such that the plaintiff "would ordinarily be expected to try them all in one judicial proceeding"). Thus, respondent's medical treatment claim provides no jurisdictional basis for the court to hear a personnel claim and issue a writ barring an action to drop respondent from the rolls of the Air Force.[9]

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[9] Nor would even the most expansive theory of pendent jurisdiction justify issuance of a writ against the President and military officials over whom the court lacked independent jurisdiction. See generally *Finley* v. *United States*, 490 U.S. 545, 551 (1989) (assertion of "pendent party" jurisdiction must be preceded by "an examination of the posture in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim") (quoting *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 373 (1978)); cf. 28 U.S.C. 1367(a) (providing for

II. THE DOUBLE JEOPARDY AND *EX POST FACTO* CLAUSES DO NOT APPLY TO THE PRESIDENT'S EXERCISE OF AUTHORITY TO DROP AN OFFICER FROM THE ROLLS OF THE ARMED FORCES

The court of appeals erred in holding that an action to drop an officer from the rolls on the basis of a prior court-martial conviction violated respondent's rights under the Double Jeopardy and *Ex Post Facto* Clauses. An action to drop from the rolls is a civil, administrative proceeding that permits the military to separate an officer whose criminal misconduct renders him unfit to serve in the military. As such, an action to drop from the rolls does not implicate the Double Jeopardy and *Ex Post Facto* Clauses.

1. The Double Jeopardy Clause of the Fifth Amendment provides that "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The *Ex Post Facto* Clause, Art. I, § 9, Cl. 3, provides that "[n]o * * * ex post facto Law shall be passed." Those constitutional provisions apply only to laws or proceedings that impose *criminal* punishment. This Court has "long recognized that the Double Jeopardy Clause does not prohibit the imposition of any additional sanction that could, in common parlance, be described as punishment. The Clause protects only against the imposition of multiple *criminal* punishments for the same offense." *Hudson* v. *United States*, 118 S. Ct. 488, 493 (1997) (internal quotation marks and citation omitted). Similarly, "[i]t always has been

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supplemental federal court jurisdiction over pendent parties when claims are "so related * * * that they form part of the same case or controversy").

considered that [the *Ex Post Facto* Clause] forbids * * * *penal* legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952) (emphasis added); see also *Kansas* v. *Hendricks*, 117 S. Ct. 2072, 2081 (1997) (Double Jeopardy and *Ex Post Facto* Clauses apply to "criminal proceedings"); *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (*Ex Post Facto* Clause).

The question whether a particular sanction is criminal or civil is initially a matter of legislative intent. *Hudson*, 118 S. Ct. at 493. If the legislature intends to create a civil sanction, that is the end of the matter unless there is "the clearest proof" that "the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Ibid.* (internal quotation marks, brackets, and citations omitted); see also *Kansas* v. *Hendricks*, 117 S. Ct. at 2081-2082; *United States* v. *Ursery*, 518 U.S. 267, 288 (1996); *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980).

In conducting the latter inquiry, the factors identified in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), and subsequent cases provide guidance. Those factors include whether the sanction historically has been regarded as punishment; whether it involves an affirmative disability or restraint; whether it promotes the traditional twin goals of punishment—retribution and deterrence; whether it is proportionate to a nonpunitive purpose; and whether it applies only upon a finding of *scienter*. See, *e.g.*, *Hudson*, 118 S. Ct. at 495-496; *Kansas* v. *Hendricks*, 117 S. Ct. at 2082-2083. That the conduct being sanctioned may also constitute a crime or that the sanction was intended to deter similar conduct is "insufficient" to render a sanction "criminal"

or "punitive." *Hudson*, 118 S. Ct. at 496; see also *Kansas* v. *Hendricks*, 117 S. Ct. at 2082; *Ursery*, 518 U.S. at 292.

2. Under that analytical framework, an action to drop an officer from the rolls because of a prior criminal conviction is not subject to double jeopardy and *ex post facto* restrictions.

a. Congress clearly intended an action to drop an officer from the rolls under 10 U.S.C. 1161(b)(2) and 1167 (Supp. II 1996) to be a civil remedy. Before 1996, Section 1161 had authorized the President to drop from the rolls officers who were absent without leave or convicted by a civilian court. In 1996, Congress amended Section 1161 and enacted Section 1167 to extend that authority to certain officers convicted by courts-martial; it did so as part of Title V of the National Defense Authorization Act for Fiscal Year 1996, which is entitled "Military Personnel Policy." Pub. L. No. 104-106, Tit. V, §§ 501-574, 110 Stat. 290-356. Similarly, Sections 1161(b)(2) and 1167 are located in Chapter 59 of Title 10 of the U.S. Code, which comprises various provisions relating to the administrative separation of servicemembers. 10 U.S.C. 1161-1177 (1994 & Supp. II 1996). By contrast, a "*punitive* separation" of an officer may occur only when a general court-martial imposes a sentence of dismissal under the UCMJ. See R.C.M. 1003(b)(9) (emphasis added). Congress's classification of an action to drop an officer from the rolls as an administrative personnel action, rather than as a feature of a court-martial sentence under the UCMJ, reveals that Congress regarded that action to be civil in character. See *Kansas* v. *Hendricks*, 117 S. Ct. at 2082 (Kansas's placement of involuntary commitment proceedings in State's "probate code, instead of the criminal code,"

supported finding that legislature intended proceedings to be civil).

For those reasons, respondent errs in contending (Br. in Opp. 10-13; see also Pet. App. 14a) that Sections 1161(b)(2) and 1167 are punitive merely because they were enacted as part of the same comprehensive public law that amended Article 57(a) and added Article 58b to the UCMJ—provisions that the court of appeals regarded as criminal punishment subject to the *Ex Post Facto* Clause. *United States* v. *Gorski*, 47 M.J. 370, 372-373 (1997).[10] Congress added Sections 1161(b)(2) and 1167 to broaden the scope of a pre-existing administrative action to drop an officer from the rolls, and did so as part of Title V of the National Defense Authorization Act for Fiscal Year 1996, which concerns military personnel matters. By contrast, Congress amended Article 57(a) and added Article 58b as part of Title XI of the Act, which contains amendments to the UCMJ. Pub. L. No. 104-106, Tit. XI, §§ 1121, 1122, 110 Stat. 462-463. Moreover, the National Defense Authorization Act for Fiscal Year 1996 spans 518 pages in the *Statutes at Large* and addresses in 57 separate Titles a variety of unrelated issues affecting the Department of Defense, such as procurement, health care, departmental organization and management, and national security policy. Particularly in those circumstances, Congress's intent in amending the UCMJ has no bearing on Congress's intent in legislating the military's personnel policies.

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[10] Article 58b mandates the forfeiture of military pay following a prescribed court-martial sentence of a servicemember; Article 57(a) provides that the effective date of any forfeiture of pay or reduction in grade that is included in a court-martial sentence of a servicemember is the earlier of 14 days after the date a sentence is adjudged or the date on which the convening authority approves the sentence. See 10 U.S.C. 857(a)(1), 858b (1994 & Supp. II 1996).

b. There is no indication, much less "the clearest proof," *Hudson*, 118 S. Ct. at 493, *Kansas* v. *Hendricks*, 117 S. Ct. at 2082, that an action to drop an officer from the rolls is so punitive in purpose or effect as to negate Congress's intent to establish a civil, administrative scheme.

First, dropping from the rolls has historically been regarded as remedial. As Judge Gierke observed in his dissent, "[d]ropping an officer from the rolls (DFR) traditionally has been treated as an administrative measure separate from the court-martial." Pet. App. 18a. It has long been recognized that "the authority to drop is a special power conferred by Congress for the purpose of relieving the army of a useless member who has himself practically abandoned it, and the treasury from the obligation of paying for services no longer rendered." W. Winthrop, *Military Law and Precedents* 746 (2d ed. 1920); 36 Op. Atty Gen. 186, 188 (1930) (the purpose of an action to drop an officer from the rolls is "not to impose additional punishment upon naval officers convicted of crime, but rather to promote the efficiency of the Navy and to maintain the high standard of its officer personnel by providing that officers who fail to maintain a certain standard of conduct may be dropped from the rolls and rendered ineligible for reappointment"); see also Art. 118 of the Articles of War, *reprinted in Digest of Davis' Military Law of the United States and The Manual for Courts-Martial* 135 (1917) (providing that "in time of peace no officer shall be dismissed except in pursuance of the sentence of a court-martial or in mitigation thereof; but the President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave or who has been absent in confinement in

a prison or penitentiary for three months after final conviction by a court of competent jurisdiction").

Consistent with the history of an action to drop from the rolls as it has existed since 1870, Sections 1161(b)(2) and 1167 further the legitimate remedial objective of separating officers who are not performing any service for the military (because they are in confinement) or whose continuation in active service is incompatible with good order and discipline. As this Court has observed, "no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting." *Chappell* v. *Wallace*, 462 U.S. at 300. Sections 1162(b)(2) and 1167 permit the President to enforce standards of behavior necessary to preserve the military mission. An administrative separation based on a court-martial conviction is thus "an important remedy" that "promote[s] military readiness and efficiency by separating from service those enlisted persons who, if retained, would lower performance and morale." *United States* v. *Rice*, 109 F.3d 151, 156 (3d Cir. 1997).

Second, the non-punitive nature of an action to drop an officer from the rolls is highlighted by the special status of an officer's military service. "[A] military officer holds a particular position of responsibility and command in the Armed Forces." *Parker* v. *Levy*, 417 U.S. 733, 744 (1974); accord *Orloff* v. *Willoughby*, 345 U.S. 83, 91 (1953). "[T]he established relationship between enlisted military personnel and their superior officers * * * is at the heart of the necessarily unique structure of the Military." *Chappell* v. *Wallace*, 462 U.S. at 300; see also *Parker* v. *Levy*, 417 U.S. at 744 (The Army's "law is that of obedience. No question can be left open as to the right to command in the officer.") (quoting *In re Grimley*, 137 U.S. 147, 153 (1890)). When

an officer has served an extended period of confinement following a final conviction by court-martial, his leadership authority in the military chain of command is seriously undermined. Congress therefore rationally determined that an action to drop such officer from the military's rolls is a remedial measure that eliminates the problems inherently associated with the presence of a convicted officer within the military leadership's ranks.

Third, an action to drop from the rolls is not rendered a penal proceeding because it is premised on a criminal conviction. Congress may impose both a civil and a criminal sanction for the same conduct. "It is well settled that Congress may impose both a criminal and a civil sanction in respect to the same act or omission. By itself, the fact that a * * * statute has some connection to a criminal violation is far from the clearest proof necessary to show that a proceeding is criminal." *United States* v. *Ursery*, 518 U.S. at 292 (internal quotation marks and citation omitted); see also *Helvering* v. *Mitchell*, 303 U.S. 391, 397-398 (1938) (no double jeopardy bar to civil and criminal sanction for tax evasion). Thus, the Court in *Hudson* held that the Double Jeopardy Clause was not implicated by the imposition of monetary penalties and an occupational debarment sanction that was based on conduct that formed the basis of an indictment under criminal banking laws. See 118 S. Ct. at 496 (the fact that "the conduct for which OCC sanctions are imposed * * * formed the basis for petitioner's indictments * * * is insufficient to render the money penalties and debarment sanctions criminally punitive"). The same conclusion applies here.

It is therefore of no constitutional significance that respondent's court-martial conviction triggered the action to terminate his military status and service. An

officer's criminal conviction may result in a variety of adverse collateral consequences that serve civil remedial goals, including administrative separation from service (10 U.S.C. 1181), revocation of a security clearance (Exec. Order No. 12,968, § 3.1(b), 3 C.F.R. 391 (1995)), or non-selection for promotion (10 U.S.C. 617(b), 630-632 (1994 & Supp. II 1996)). The fact that those personnel actions may directly follow from a criminal conviction does not transform those remedial sanctions into criminal penalties. See *Koon* v. *United States*, 518 U.S. 81, 110 (1996) ("[M]any public employees are subject to termination and are prevented from obtaining future government employment following conviction of a serious crime, whether or not the crime relates to their employment."); 10 U.S.C. 504 (generally barring felons from enlisting in the military); cf. *DeVeau* v. *Braisted*, 363 U.S. 144, 159-160 (1960) (plurality opinion of J. Frankfurter) (noting federal and state governments' "wide utilization of disqualification of convicted felons for certain employments closely touching the public interest" and rejecting *ex post facto* challenge to New York's bar of ex-felons from union office); *FDIC* v. *Mallen*, 486 U.S. 230 (1988) (rejecting due process challenge to suspension of indicted bank officer).

The courts of appeals have consistently rejected arguments that termination of military service constitutes criminal "punishment" for purposes of the Double Jeopardy Clause. See *United States* v. *Rice*, 109 F.3d at 153 (rejecting defendant's claim that a "general discharge was punishment and the functional equivalent of a criminal prosecution barring subsequent prosecution for the same offense"); *United States* v. *Smith*, 912 F.2d 322, 323-324 (9th Cir. 1990) (rejecting claim that administrative discharge in lieu of court-martial barred sub-

sequent criminal charges arising out of same conduct); cf. *United States* v. *Reyes*, 87 F.3d 676, 681 (5th Cir. 1996) ("To construe the Double Jeopardy Clause to include [adverse employment action] as 'punishment' would confer on governmental employees rights against subsequent criminal prosecution—certainly the central thrust of the Double Jeopardy Clause—that private employees do not have. Such unequal protection from criminal prosecution is inconsistent with all our traditions."). The same conclusion applies here to the administrative action of dropping an officer from the rolls.

Fourth, an action to drop respondent from the military's rolls does not constitute criminal punishment on the theory that such action results in a stigmatizing loss of military pay and allowances, and possibly the denial of veterans' benefits. See Pet. App. 14a; Br. in Opp. 12-14. The loss of pay and allowances that results from an action to drop from the rolls is indistinguishable in purpose and effect from the loss of pay and allowances that inevitably results from any involuntary separation of employment from the military, including a separation because of a defective enlistment, drug abuse, the convenience of the government, unsatisfactory performance of military duty, or misconduct that is not a criminal offense. 32 C.F.R. Pt. 41, App. A; see also Air Force Instruction 36-3206. In none of those circumstances would any stigma associated with the termination of military status and pay constitute criminal punishment. Cf. *Parker* v. *Levy*, 417 U.S. at 750 ("Forfeiture of pay, reduction in rank, and even dismissal from the service [resulting from a court-martial] bring to mind the law of labor-management relations as much as the civilian criminal law."). Indeed, an action to drop from the rolls does not result in a characterization of service by the military. See Pet. App. 26a (notifying respondent that

his "service will not be characterized" once dropped from the Air Force's rolls); see also *Helmich* v. *Nibert*, 543 F. Supp. 725, 727-728 (D. Md.) ("[S]eparation * * * by dropping * * * from the rolls * * * is purely a non-disciplinary administrative action which carries no connotations, good or bad.") (citation omitted), aff'd, 696 F.2d 990 (4th Cir. 1982); cf. 32 C.F.R. Pt. 41, App. A, pt. 2, C.3.c (authorizing an action to drop an enlisted member from the rolls "when such action is authorized by the Military Department concerned and a characterization of service * * * is not authorized or warranted").

This Court has long since rejected the notion that a military officer has "any vested interest or contract right in his office of which Congress could not deprive him." *Crenshaw* v. *United States*, 134 U.S. 99, 104 (1890). It is similarly settled that "revocation of a privilege voluntarily granted * * * is characteristically free of the punitive criminal element." *Hudson*, 118 S. Ct. at 496 (quoting *Helvering* v. *Mitchell*, 303 U.S. at 399 & n.2); see also *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960) (rejecting *ex post facto*, bill of attainder, and Sixth Amendment challenges to provision terminating Social Security benefits of deported aliens based on membership in Communist Party, because "the sanction is the mere denial of a noncontractual governmental benefit" that imposes "[n]o affirmative disability or restraint," and "certainly nothing approaching the 'infamous punishment' of imprisonment"). The denial of military privileges associated with the separation from military office therefore hardly establishes "the clearest proof" that "the statutory scheme [is] so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Hudson*, 118 S.

Ct. at 493 (internal quotation marks, brackets, and citations omitted).

3. The absence of any sound basis for treating an action to drop from the rolls as a criminal proceeding subject to the restrictions of the Double Jeopardy and *Ex Post Facto* Clauses is reinforced by this Court's repeated recognition that "the military in important respects remains a 'specialized society separate from civilian society," *Weiss*, 510 U.S. at 174 (quoting *Parker* v. *Levy*, 417 U.S. at 743), whose essential function is "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955); see also *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975). In vesting Congress with the power to "make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14, "the Constitution contemplates that Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.'" *Weiss*, 510 U.S. at 177 (quoting *Chappell* v. *Wallace*, 462 U.S. at 301). The court of appeals' decision does not reflect consideration of those factors, and it similarly slights the judgments of the political branches in this area. See, *e.g.*, *Weiss*, 510 U.S. at 177; see also *Loving* v. *United States*, 517 U.S. 748, 768-773 (1996); *Goldman* v. *Weinberger*, 475 U.S. 503, 508 (1986). Consistent with Congress's constitutional powers over military affairs (and the President's authority to commission officers in the first instance, U.S. Const. Art. II, § 3), Congress authorized the President to invoke a remedial procedure to remove a convicted officer from the military chain of command. The court of appeals erred in concluding that Congress

is constitutionally prohibited from making that political judgment.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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